

Federal Court



Cour fédérale

**Date: 20240916**

**Docket: T-518-24**

**Citation: 2024 FC 1452**

**Ottawa, Ontario, September 16, 2024**

**PRESENT: The Honourable Madam Justice Turley**

**BETWEEN:**

**NADIR OLIVET**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS FOR JUDGMENT**

**I. Overview**

[1] The Applicant seeks judicial review of two decisions dated February 23, 2024, made by a Canada Revenue Agency [CRA] Canada Emergency Benefits Validation officer [Officer]. In one decision, the Officer determined that the Applicant was not eligible for the Canada Emergency Response Benefit [CERB], and in the other decision, the Officer found the Applicant ineligible for the Canada Recovery Benefit [CRB].

[2] For the reasons that follow, I am dismissing the application. In respect of the CERB decision, by virtue of the *Canada Emergency Response Benefit and Employment Insurance Emergency Response Benefit Remission Order, SI/2021-19 [Remission Order]*, the Applicant is not required to repay the CERB payments he received. On this basis, the judicial review application is moot as it relates to the CERB decision. There is no longer a live controversy for the Court to adjudicate. In the CRB decision, the Officer reasonably concluded that the Applicant was ineligible for the benefits because he did not earn at least \$5,000 of net self-employment income in the relevant time period, as required by the legislation.

[3] Furthermore, I am unable to find any procedural unfairness in the Officer's decision-making process. The Applicant has not demonstrated that his right to be heard was violated, and that he did not know the case he had to meet.

## **II. Background**

[4] The Applicant is a self-employed small business owner of a bike shop in Toronto. He received CERB payments from April 8, 2020 to September 3, 2020, and CRB payments from October 14, 2020 to October 28, 2021. In total, he received \$24,600.

[5] By letter dated October 6, 2022, the CRA advised the Applicant that his account had been selected for review and requested documents to support his eligibility for the CERB and the CRB. In response, the Applicant corresponded with the CRA multiple times and submitted documentation in February and March 2023 to support his entitlement to the benefits.

[6] The CRA determined that the Applicant was not eligible for the CERB and the CRB, by letters dated April 12, 2023. The reason given was that he did not earn at least \$5,000 (before taxes) of employment or self-employment income in the relevant time period.

[7] The Applicant subsequently provided the CRA with additional documentation, including bank statements. The CRA treated these submissions as a request for a second review of his eligibility for the CERB and the CRB.

[8] As part of their review, the Officer considered various documents and information, including prior entries made by other CRA officers on its computer systems, the Applicant's prior submissions, information gathered during telephone calls with the Applicant, and the Applicant's income and deductions from income for the 2019, 2020, and 2021 taxation years.

[9] While the Applicant had earned over \$5,000 of gross self-employment income in the 2019 and 2020 taxation years, he suffered net losses. With respect to the 2021 taxation year, the Applicant earned over \$5,000 in net self-employment income. However, this income was made after the CRB period.

[10] During a telephone call in February 2024, prior to issuing the decision, the Officer explained the *Remission Order* to the Applicant. The Applicant was advised that even though he would receive a letter saying he is ineligible, he would not be required to repay the CERB payments he had received.

[11] By letters dated February 23, 2024, the Officer advised the Applicant that he was not eligible for the CERB and the CRB because he did not meet the earnings eligibility criteria.

### **III. Issues and Standard of Review**

[12] The Applicant makes three main arguments in support of his judicial review application. First, he argues that the Officer's conclusion that he did not meet the eligibility criteria for the benefits is not justified. Second, the Applicant alleges that the CRA breached procedural fairness. Third, the Applicant alleges that the CRA breached his rights under the CRA's "Taxpayer Bill of Rights" and the "Commitment to Small Business".

[13] The standard of review applicable to determinations of eligibility for the benefits administered by the CRA is reasonableness: *Aryan v Canada (Attorney General)*, 2022 FC 139 at para 16 [*Aryan*]; *Walker v Canada (Attorney General)*, 2022 FC 381 at para 15. A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker": *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85 [*Vavilov*]; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 8 [*Mason*]. A decision should only be set aside if there are "sufficiently serious shortcomings" such that it does not exhibit the requisite attributes of "justification, intelligibility and transparency": *Vavilov* at para 100; *Mason* at paras 59-61.

[14] Where breaches of procedural fairness are alleged, no standard of review is applied but the Court's reviewing exercise is "best reflected on a correctness standard": *Canadian Hardwood*

*Plywood and Veneer Association v Canada (Attorney General)*, 2023 FCA 74 at para 57; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*CPR*]. When assessing whether procedural fairness was met, a reviewing court asks whether the “procedure was fair having regard to all of the circumstances”: *CPR* at para 54.

#### IV. Analysis

##### A. *Preliminary Issues*

[15] The Respondent raised three preliminary issues: (i) the proper respondent; (ii) challenging multiple decisions in one judicial review application; and (iii) the admissibility of evidence.

[16] As I said at the hearing, I agree with Respondent that, in accordance with Rule 303(2) of the *Federal Courts Rules*, SOR/98-106 [*Rules*], the proper respondent is the Attorney General of Canada. As a result, I ordered that the style of cause be amended to name the Attorney General of Canada as the Respondent, rather than the Canada Revenue Agency.

[17] I also agree with the Respondent that the Court should grant leave to allow the Applicant to challenge both the CERB and the CRB decisions in this application, pursuant to Rule 302 of the *Rules*. The two decisions were made by the same decision-maker, based on the same record, under two related statutes, and on the same legal basis. I am satisfied that it is in the interests of justice to consider both decisions together in this application: *Vincent v Canada (Attorney General)*, 2024 FC 803 at para 9; *James v Canada (Attorney General)*, 2024 FC 730 at paras 15-17; *Rehman v Canada (Attorney General)*, 2023 FC 1534 at paras 15-17.

[18] Finally, the Respondent takes issue with certain documents included in exhibits B through G of the Applicant's affidavit because they were not before the Officer when they made their decision. The Officer's affidavit lists which documents in the Application Record were before them, and which were not.

[19] Generally, arguments and evidence not before the decision-maker when they made their decision are not admissible before this Court on judicial review: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19 [*Access Copyright*]; *Datta v Canada (Attorney General)*, 2022 FC 973 at paras 29-30; *Lussier v Canada (Attorney General)*, 2022 FC 935 at para 2. I agree with the Respondent that none of the exceptions to this general rule apply here: *Access Copyright* at para 20. As a result, I did not consider those documents that were included in exhibits B through G of the Applicant's affidavit that were not before the Officer.

B. *The CERB decision is moot*

[20] The CERB was introduced on March 25, 2020 by the federal government in response to the COVID-19 pandemic to offer financial support to employed and self-employed Canadians: *Canada Emergency Response Benefit Act*, SC 2020, c 5, s 8 [*CERB Act*].

[21] To qualify for the CERB, a person must have had a total income of at least \$5,000 from employment, self-employment, benefits, or allowances under pregnancy or parental leave plans in 2019 or the 12-month period before they applied for the benefits: *CERB Act*, s 2. The *CERB Act*,

unlike the *Canada Recovery Benefits Act*, SC 2020, c 12, s 2 [*CRB Act*], did not specify that income from self-employment is net income.

[22] The *Remission Order* came into force on May 12, 2021. As my colleague Justice Fothergill held, it “was intended to ameliorate the effects of possible confusion surrounding eligibility for the CERB, which was introduced with short notice at the beginning of a public health emergency”: *Flock v Canada (Attorney General)*, 2022 FC 305 at para 22 [*Flock FC*].

[23] In accordance with the *Remission Order*, self-employed individuals are exempted from repaying any CERB benefits they received if: (i) their gross self-employment income was \$5,000 or more in 2019, or the 12 months prior to their application; and (ii) they filed their 2019 and 2020 income tax returns by December 31, 2022: *Remission Order*, s 1(1).

[24] After reviewing the Applicant’s file, the Officer determined that he was eligible for remission. The Officer advised the Applicant that based on the *Remission Order*, he would not have to repay the CERB benefits he had received, but that he would still receive a letter saying he was ineligible. Indeed, the letter stated that he was ineligible for the benefits because he “did not earn at least \$5,000 (before taxes) of employment or self-employment income in 2019 or in the 12 months before the date of [his] first application”. The letter did not state, however, that the Applicant was eligible for remission.

[25] It is understandable that the Applicant sought clarification from the Officer when he received the CERB letter given that it did not mention the *Remission Order*, or that he was not

required to repay the CERB benefits. In order to mitigate such confusion, it would be preferable for the CRA to make clear in its CERB decision letters when individuals are not required to repay the CERB benefits, pursuant to the *Remission Order*. The Applicant confirmed, at the hearing, that the CRA has not sought repayment of the CERB benefits.

[26] Given that the Applicant is not required to repay the CERB benefits, the issue of the Applicant's CERB eligibility is moot.

[27] Mootness is assessed based on the two-part test set out in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*]. The first question is whether the proceeding is moot, particularly "whether a live controversy remains that affects or may affect the rights of the parties": *Democracy Watch v Canada (Attorney General)*, 2018 FCA 195 at para 10 [*Democracy Watch*].

[28] If there is no live controversy, then the second question arises: whether the court should exercise its discretion to nevertheless hear the matter: *Democracy Watch* at para 10. In deciding whether to hear a moot case, three factors guide the Court's exercise of discretion: (i) the absence or presence of an adversarial context; (ii) the concern for judicial economy; and (iii) the Court's proper law-making role: *Borowski* at 345, 346; *Hakizimana v Canada (Public Safety and Emergency Preparedness)*, 2022 FCA 33 at para 20 [*Hakizimana*]; *Democracy Watch* at para 13. At this stage, the ultimate question is whether it is in the interests of justice to adjudicate the matter: *Canada (Public Safety and Emergency Preparedness) v Allen*, 2019 FC 932 at para 14.



[29] In the circumstances, there is no live controversy affecting the Applicant's rights since he is not required to repay the CERB. Notably, Justice Brown approved the discontinuance of a proposed class proceeding by a representative plaintiff in light of the *Remission Order*. He concluded that whether self-employment income for the purposes of the *CERB Act* "refers to 'net' or 'gross' income is of no practical consequence to Ms. Ryan or members of the proposed class" [emphasis added]: *Ryan v Canada (Attorney General)*, 2021 FC 825 at para 20. This reasoning is equally applicable in this case.

[30] Furthermore, considering the relevant factors, I am not prepared to exercise my discretion to hear this matter. It is not in the interests of justice to address the issue of the proper interpretation of the *CERB Act*, and more particularly whether the Officer erred in concluding that the Applicant was ineligible for the CERB based on his net self-employment income. I have therefore not considered the Applicant's arguments as they relate to the CERB decision.

C. *The Officer's CRB decision is reasonable*

[31] The CRB was another measure introduced by the federal government during the pandemic to provide relief for employed and self-employed Canadians. It was available between September 27, 2020 and October 23, 2021.

[32] The *CRB Act* expressly stipulates that income from self-employment is net income for the purposes of the CRB. More particularly, it provides that "income from self-employment is revenue from the self-employment less expenses incurred to earn that revenue": *CRB Act*, s 3(2). The Officer was required to assess the Applicant's eligibility based on this statutory criteria: *Flock v*

*Canada (Attorney General)*, 2022 FCA 187 at paras 4, 7 [*Flock FCA*]; *Xin v Canada (Attorney General)*, 2023 FC 595 at para 83.

[33] Based on the Applicant's documentation, the Officer determined that he had earned \$90,950.05 of gross self-employment income in 2019, and \$114,341.39 in 2020. However, the Applicant had a net loss of \$2,067 in 2019, and a net loss of \$12,849 in 2020. As a result, the Applicant did not meet the requisite net income threshold to qualify for the CRB.

[34] While the Applicant earned \$5,052 in net self-employment income in 2021, he only earned this income as of November 2021. However, the CRB program ended on October 23, 2021: *CRB Act*, s 4(1). Therefore, this income did not qualify the Applicant for the benefits.

[35] I empathize with the Applicant's position as a small retailer, struggling to make ends meet during the pandemic. However, as held by the Federal Court of Appeal in *Flock FCA*, the Officer did not have any discretion to depart from the statutory criteria for eligibility:

[7] . . . This is not a basis for relief by way of judicial review because the CRA official had no choice but to assess Mr. Flock's entitlement to the CRB based on the eligibility criteria set out in the legislation. This was a policy decision that Parliament was entitled to make, and the official had no ability to provide relief on grounds of fairness only.

[Emphasis added]

[36] Based on the evidentiary record, the Officer's decision that the Applicant did not meet the requirement of \$5,000 in net income to qualify for the CRB is reasonable.

D. *No Breaches of Procedural Fairness*

[37] The Applicant alleges that his right to be heard was violated by a lack of transparency on the CRA's part. He argues that this made it impossible for him to know the case he had to meet. Based on the record, I cannot agree.

[38] The Applicant was given ample opportunity to make submissions and provide relevant documentation and, in fact, he did so. He made submissions twice before the initial decision was rendered, and again before the second decision. The Applicant regularly contacted the CRA, and spoke directly with the Officer before they rendered their decision. The Applicant knew the case he had to meet as the Officer explained the net income requirement.

[39] The Applicant further alleges a breach of the doctrine of legitimate expectations. The law is clear, however, that the doctrine does not create substantive legal rights or entitle someone to a particular outcome: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 97; *Chelsea (Municipality) v Canada (Attorney General)*, 2024 FCA 89 at para 36. Instead, it "is limited to procedural relief": *Flock FC* at para 23. The doctrine cannot thus be relied on to argue that the Applicant was entitled to receive the CRB.

[40] Finally, the Applicant argues that the CRA's delay in undertaking the second review breached procedural fairness. More specifically, he asserts that the Officer did not contact him until February 19, 2024, nine months after the second review began.

[41] Delay may adversely affect the fairness of a process where: (a) it impairs a party's ability to answer a complaint against them; or (b) it has caused a party "significant prejudice": *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 at paras 41-42. As discussed above, however, the Applicant had sufficient opportunity to make his case. In addition, the Applicant did not allege any significant prejudice. Consequently, the Applicant has not demonstrated that any delay caused procedural unfairness.

[42] Based on the foregoing, I am unable to find any breaches of procedural fairness in the decision-making process.

E. *Taxpayer Bill of Rights*

[43] In his written submissions, the Applicant alleges that the CRA violated his rights under the "Taxpayer Bill of Rights" (rights 4, 5, 6, 8, and 11), and the "Commitment to Small Business" (commitment 5). The Applicant did not address this argument further at the hearing.

[44] The "Taxpayer Bill of Rights" is an administrative guide published by the CRA, pledging certain service standards: *El-Nakady v Canada*, 2024 FC 254 at para 37 [*El-Nakady*]; *Johnson v The Queen*, 2022 TCC 31 at para 25. It sets out 16 rights that describe the treatment taxpayers are entitled to in their dealings with the CRA. In addition, it sets out 5 commitments to small businesses. As Justice McHaffie explained, it "sets out the process through which each right is protected, which may include the ability to file reviews or appeals; complain to the Commissioner of Official Languages, the Information Commissioner of Canada, or the Privacy Commissioner of Canada; or follow the CRA Service Complaint process": *El-Nakady* at para 37.

[45] As a reviewing court, my role is to assess whether the Officer's decision is reasonable and procedurally fair. For the reasons set out above, after considering the record and the parties' submissions, I am satisfied that the Officer's CRB decision is both reasonable and procedurally fair, and, as such, there are no grounds upon which I may set the decision aside.

[46] To the extent that the Applicant has a complaint about the treatment or service he received in his dealings with the CRA officers, the Applicant may pursue the available recourse as set out in the "Taxpayer Bill of Rights".

**V. Conclusion**

[47] The Officer's decision regarding the Applicant's eligibility for the CERB is moot, and there are no reviewable errors in their decision regarding the Applicant's CRB eligibility. The application for judicial review is, therefore, dismissed.

[48] The Respondent advised the Court at the hearing that they were no longer seeking costs. I agree that, in the circumstances of this case, costs should not be awarded against the Applicant.

**JUDGMENT in T-518-24**

**THIS COURT'S JUDGMENT is that:**

1. The style of cause is amended to name the Attorney General of Canada as the sole Respondent.
2. The application for judicial review is dismissed, without costs.

"Anne M. Turley"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-518-24

**STYLE OF CAUSE:** NADIR OLIVET v THE ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** SEPTEMBER 9, 2024

**JUDGMENT AND REASONS FOR JUDGMENT:** TURLEY J.

**DATED:** SEPTEMBER 16, 2024

**APPEARANCES:**

Nadir Olivet	FOR THE APPLICANT ON HIS OWN BEHALF
Casey Bee	FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT
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